APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA NORTHERN DIVISION

FILED
Sep. 3, 1971
JANE P. GORDON, Clerk
By _____
Deputy Clerk

L. M. BERRYHILL, ET AL,)
)
Plaintiffs,)
) CIVIL ACTION
VS.) NO. 3339-N
)
THOMAS S. GIBSON, ET AL,)
)
Defendants.)

ORDER

In accordance with the opinion entered this date, it is the ORDER and JUDGMENT of this Court that:

1. The Motion to Dismiss of the Defendants as amended be, and the same is hereby, denied;

2. Thomas S. Gibson, E. E. Ashbee, George R. Carlton, Milton E. Warr and Willard Smith, individually and as members of the State Board of Optometry of the State of Alabama and their successors in office as such are hereby restrained and enjoined from conducting a hearing on the charges heretofore preferred against the Plaintiffs and from revoking the licenses of the Plaintiffs to practice optometry within the State of Alabama;

3. Other relief prayed for by the Plaintiffs in this proceeding be, and the same is hereby, denied;

4. The Cross-Claim of the Defendants be, and the same is hereby, dismissed without prejudice.

[APPENDIX]

DONE this 3rd day of September, 1971.

s/ Robert T. Rives
United States Circuit Judge

s/ R. E. Varner
United States District Judge

s/ Frank W. Johnson, Jr.
United States District Judge

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THOMAS S. GIBSON, ET AL,)
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Defendants.)

Before RIVES, Circuit Judge, and JOHNSON and VARNER, District Judges

OPINION

VARNER, District Judge:

Plaintiffs in the above cause are licensed optometrists under the state law, Code of Alabama, Title 46, §§190, et seq. In October, 1965, each of the Plaintiffs was employed by Lee Optical Company of Alabama, Inc., or was working on the premises of said corporation in fitting glasses and

doing related optometry work in association with the sale by Lee Optical Company, Inc., of glasses to the public. In October, 1965, Plaintiffs were charged by the President of the Alabama Optometric Association with having violated several sections of the Alabama optometry law in a proceeding to be decided by the State Board of Optometry, with the result of suspending or not suspending the licenses of each of the Plaintiffs. The matter of license suspension has been pending since 1965 but has not been actively prosecuted until Plaintiffs were notified in the spring of 1971 by the Board that the matters pending against them would be heard the latter part of May, 1971.

Plaintiffs filed this proceeding requesting a three-judge court to determine the constitutionality of the statute pursuant to which the Alabama Optometric Association seeks suspension of the licenses of the Plaintiffs. Plaintiffs seek an injunction against prosecution of said state proceedings. To this end, a three-judge court has been empaneled. By Cross-Claim, Defendants seek to have this Court revoke Plaintiffs' licenses to practice optometry. By agreement, the administrative prosecution has been suspended pending this proceeding.

Plaintiffs insist that suspension of their licenses would deprive them of the right to seek remuneration from practicing their profession and, therefore, deprive them of their property without due process of law. More specifically, they say the following:

1. That since the individual members of the State Board of Optometry are substantially the same individuals who signed affidavits in 1965 stating, or supporting proceedings charging, that the Defendants (Plaintiffs here) had committed the violations charged in the proceedings, conviction of the offenses charged and suspension of licenses are but predetermined formalities with no element of a fair trial;

2. That the statutes under which Plaintiffs are being prosecuted, as they pertain to the Plaintiffs' rights to appeal from any adverse decision, are unconstitutional, particularly, in providing no method of superseding the suspension of licenses in question pending court review; and

3. That the State Board of Optometry is illegally constituted in that only about one-half of the practicing optometrists of the state may participate in the government of their profession.

The initial question in this case is whether this is such a situation as will require or permit federal intervention to restrain actions of a state court or administrative body. The Supreme Court in several recent cases has indicated federal reluctance to intervene, even to secure federal constitutional rights, in state judicial or administrative proceedings unless particular harassment or irreparable injury will result from the state proceeding. The Court in *Younger* v. *Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971), held that there is no irreparable injury if the threat to the plaintiff's federally-protected rights can be eliminated by defense of a single criminal prosecution, that "our federalism" ordinarily precludes an injunction against pending state criminal proceedings, and that the federal courts ordinarily should not intervene by injunction even to protect federally-protected rights without any showing of bad faith, harassment, or any other unusual circumstances that would call for equitable relief, 91 S.Ct. at 755. While dicta in *Younger* may indicate that the rule of that case does not apply in civil cases, no distinction is made between civil and criminal cases by Congress in the anti-injunction act, 28 U.S.C. 2283. However, it has been held that this statute is not applicable to state administrative proceedings, *Engelman* v. *Cahn*, 425 F.2d 954. The case of *Samuels* v. *Mackell*, 401 U.S. 66, 91 S.Ct. 764, 27 L.Ed.2d 688 (1971), indicated that "the same equitable principles relevant to the propriety of an injunction must be taken into consideration by

federal district courts in determining whether to issue a declaratory judgment, a[nd * * * where an injunction would be impermissible under these principles, declaratory relief should ordinarily be d[enied as well." 91 S.Ct. 25, 768. In the case of *Dyson* v. *S[tein*, 401 U.S. 200, 91 S.Ct., 769, 27 L.Ed.2d 781 (1971), a [district court's injunctive relief to a person charged under [the Texas obscenity statute, on the basis of the district cou[rt's conclusion that the statute was unconstitutional, was r[eversed and remanded since injunctive relief was proper [only where irreparable injury was threatened and there w[as no irreparable injury found by the district court. In *Pe[rez* v. *Ledesma*, 401 U.S. 82, 91 S.Ct. 674, 27 L.Ed.2d 701 (19[71), the Supreme Court held it was improper to interfere [with enforcement of a Louisiana obscenity statute by s[uppressing evidence held to have been improperly seized, [since the plaintiff could present his challenge to the seizur[e in the state prosecution. In *Byrne* v. *Karalexis*, 401 U.S. [216, 91 S.Ct. 777, 27 L.Ed.2d 792 (1971), the Supreme C[ourt reversed a Massachusetts District Court enjoining en[forcement of the state statute at the instance of the defend[ant who was under state court indictment for violation o[f the statute and remanded the case in the light of *Younger* [and *Samuels* since there had been no finding that the th[reat to the plaintiff's constitutional rights was one that cou[ld not be eliminated by his defense against a single crimin[al prosecution. On the other hand, federal courts will enj[oin state proceedings, even in criminal cases, to protect f[ederal rights where irreparable injury is threatened or t[o prevent continued harassment, *Ex Parte Young*, 209 U.S. [123, 28 S.Ct. 441, 52 L.Ed. 714; *Dombroski* v. *Pfister*, 380 U[.S. 479, 85 S.Ct. 1116, 14 L.Ed.2d 22.

Pleadings and unc[ontradicted evidence in the instant case indicate that Plai[ntiffs have been actively practicing their professions since [prior to 1965 and that the cases against them have bee[n pending since that time, that the individuals who will ac[t as judges of their cases are largely the same individuals w[ho in 1965 supported prosecution of

Plaintiffs for the very acts for which they are now being charged; that the statutes under which they are being prosecuted provide no precautions against the Board's acting as investigator, prosecutor, and judge all in the same case and provide for no supersedeas of suspension of license, pending an appeal; and that the organization charged with judging the ethics of Petitioners and with possibly suspending their licenses, is the State Board of Optometry, a board selected from the state's 100 private practitioners of optometry who must govern the state's 192 optometrists, of whom about 92 work for some other person or entity.

The Alabama Optometric Association is a corporation formed by, and whose membership is limited to, private practitioners of the profession of optometry whose services are available to the public. The State Board of Optometry is an unincorporated Board created pursuant to Code of Alabama, Title 46, §192, and is appointed by the Governor from members in good standing of the Alabama Optometric Association. In Alabama, approximately 100 practicing optometrists are in private practice of optometry and their services are available to the public while approximately 92 optometrists are employed by other persons or other entities. By virtue of the rules of the Association, the employed optometrists may not be members of the Association, and by virtue of said Section 192, no person other than members of the Association may serve on the State Board of Optometry. It follows, therefore, that no optometrist, employed by any other person or entity, may serve on the State Board of Optometry and that, therefore, 92 of the state's 192 practicing optometrists have no right to participate in the government of their own profession.

Code of Alabama, Title 46, §206, provides authority for suspension or revocation of the license to practice optometry within the State of Alabama by the State Board of Optometry for certain causes in addition to those causes heretofore excluded by the Supreme Court of Alabama in *McCrory* v. *Wood*, 277 Ala. 426, 171 So.2d 241.

The question of possible bias of the Board members in this case is not whether the members are actually biased but whether, in the natural course of events, there is an indication of a possible temptation to an average man sitting as a judge to try the case with bias for or against any issue presented to him. A basic element of justice in America is that the court must avoid, not only evil but, the appearance thereof. The Supreme Court of the United States in *Re Murchison*, 349 U.S. 133, 99 L.Ed. 942, 75 S.Ct. 623, wrote the following:

> "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. Circumstances and relationships must be considered. This Court has said, however, that 'every procedure which would offer a possible temptation to the average man as a judge . . . not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law.' Tumey v. Ohio, 273 U.S. 510, 532, 71 L.Ed. 749, 758, 47 S.Ct. 437, 50 A.L.R. 1243. Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weight the scales of justice equally between contending parties. But to perform its high function in the best way 'justice must satisfy the appearance of justice.' Offutt v. United States, 348 U.S. 11, 99 L.Ed. 11, 75 S.Ct. 11."

In the instant case, there is evidence that those who are to judge the matters of suspension of licenses in the state administrative body have indicated their preconceived opinion in the case and that Lee Optical, for whom Plaintiffs worked, issued over 75,000 eyeglasses in one year.

Presumably, if Plaintiffs' activities are suspended, Defendants would share in this annual business. Plaintiffs argue that the suspension of licenses of the Plaintiffs is but a matter of form and that, when the same are suspended, no supersedeas being provided, the Plaintiffs will be deprived of an opportunity to practice their profession until relief can be secured from the courts of the State of Alabama.

Supersedeas is within the power of the court without statutory authority therefor. *Huett* v. *Nevins*, 50 So.2d 160, 255 Ala. 37; *Campbell* v. *Byers*, 60 So. 737, 6 Ala.App. 292. Appeal from a judgment, when no statute requires a supersedeas bond to effect a suspension, ordinarily suspends the judgment without such a bond. *Ex Parte Cudd*, 195 Ala. 80, 70 So. 721; *Riley* v. *Wilkinson*, 25 So.2d 384, 247 Ala. 579. Note the evolution of the law associated therewith discussed at 4 Am.Jur.2d 839, Appeal and Error, §365.

Nonetheless, this Court is of the opinion that the statute places the fate of Plaintiffs, as practicing optometrists, in the hands of persons who have apparent personal interests in the matter in controversy. This invades the very core of due process of law.

Revocation of the license of a professional man to practice his profession, together with the attendant publicity which would inevitably be associated therewith, would cause irreparable damage to the Plaintiffs. No method is provided under the state law to avoid this irreparable damage. There is no necessity for exhausting state administrative remedy unless that remedy would be adequate. *Kelly* v. *Board of Education*, 159 F.Supp. 272. It is, therefore, the conclusion of this Court that to require the Plaintiffs to resort to the protection offered by state law in these cases would effectively deprive them of their property, that is, their right to practice their professions, without due process of law and that irreparable injury would follow in the normal course of events. *Miller* v. *Aldridge*, 212 Ala. 660, 103 So. 835; *Mack* v. *Florida State Board of Dentistry*, 296 F.Supp. 1259.

We turn now to the counterclaim of the Defendants. This matter was not called to the Court's attention at the pretrial hearing and no issue was formulated thereon in the pretrial order. That order limits the issues and controls the course of the action unless modified to prevent manifest injustice, Rule 16, Federal Rules of Civil Procedure. The counterclaim would be no more than a permissive counterclaim as distinguished from a compulsory counterclaim, *Big Cola Corp.* v. *World Bottling Co.*, 134 F.2d 718; *Weber* v. *Weber*, 44 F.R.D. 227; *Non-Ferrons Metal, Inc.* v. *Saramar Aluminum Co.*, 25 F.R.D. 102; *American Samec Corp.* v. *Florian*, 9 F.R.D. 718. We, therefore, conclude that no manifest injustice would result from failure to consider the counterclaim and that the same should be dismissed.

This 3rd day of September, 1971.

s/ Richard T. Rives
United States Circuit Judge

s/ R. E. Varner
United States District Judge

s/ Frank W. Johnson, Jr.
United States District Judge

APPENDIX B

[CODE OF ALABAMA]

* * * * * * *

§ 206. (2889) License may be suspended or revoked.—A license issued to any person may be suspended for a definite period of time, or revoked by the state board of optometry for any of the following reasons; to-wit: Conviction of any offense involving moral turpitude, in which case, the record of conviction, or a certified copy thereof certified by the clerk of the court or by the judge in which court the conviction is had, shall be conclusive evidence of such conviction. For unprofessional conduct. "Unprofessional conduct" shall be defined to mean any conduct of a character likely to deceive or defraud the public, lending his license by any licensed optometrist to any person, the employment of "cappers", or "steerers" to obtain business, "splitting" or dividing a fee with any person or persons, the obtaining of any fee or compensation by fraud or misrepresentation, employing directly or indirectly any suspended or unlicensed optometrist to do any optometrical work, by use of any advertising, carrying the advertising of articles not connected with the profession, the employment of any drugs or medicines in his practice unless authorized to do so by the laws covering the practice of medicine of this state, or the doing or performing of any acts in his profession declared by the Alabama Optometric Association to be unethical or contrary to good practice. When a license or certificate has been obtained by fraud practiced on the board. When the holder of a license or certificate is suffering from a contagious or infectious disease. Gross incompetency. Intemperance in the use of intoxicating liquors or narcotics to such an extent as unfits the holder of the license for the proper practice of optometry. Whenever charges are preferred against any holder of a license the board shall fix a time and place for the hearing of the same,

and a copy of the charges, which must be made in writing, and verified by oath, together with a notice of the time and place where they will be heard and determined, shall be served upon the accused at least ten days before the date fixed for said hearing. When personal service cannot be effected, the board shall cause to be published at least thirty days prior to the date set for the hearing in a newspaper published in the county in which accused was last known to practice, a notice to the effect that at a definite time and place a hearing will be held by the board on charges preferred against said person. The board may compel the attendance of witnesses at said hearing; the accused shall have the right to be confronted by the person or persons preferring said charges, to cross-examine the witnesses against him, to be represented by counsel, and to have the testimony taken down by a stenographer, but the expense of counsel and stenographer, either or both, shall be borne by the accused. Witnesses at hearings before the board shall testify under oath and may be sworn by any member of the board. In all cases of suspension or revocation of licenses as herein provided for, the holder may appeal to the circuit court, or other court of like jurisdiction, in the county in which the person whose license or certificate is ordered revoked resides. (Ib.)

APPENDIX C

[Old Section 210 Before Repeal]

§ 210. (2893) Store where glasses are sold; how department conducted.—Nothing in this chapter shall be so construed as to prevent any person, firm or corporation from owning or operating a store or business establishment wherein eyes are examined or glasses fitted; provided, that such a store, establishment, or optometric department shall be in charge of a duly licensed optometrist, whose name must appear on and in all optometry advertising of whatsovere nature done by said person, firm or corporation. (Ib.)

[Old Section 211 Before Amendment]

§ 211. (4387) False or misleading statements in advertisements or stores having optometry departments.—It shall be unlawful for any person, firm or corporation, engaged in the practice of optometry in this state, to print or cause to be printed, or circulate or cause to be circulated, or publish, by any means whatsoever, any advertisement or circular in which appears any untruthful, impossible, or improbable or misleading statement or statements, or anything calculated or intended to mislead or deceive the public. And it shall be unlawful for any individual, firm or corporation, engaged in the sale of goods, wares or merchandise who maintains or operates, or who allows to be maintained and operated in connection with said mercantile business an optometry department; or who rents or subleases to any person or persons for the purpose of engaging in the practice of optometry therein, any portion of or space in said store, premises or establishment in which such person, firm or corporation is engaged in said mercantile business, to publish, or circulate, or print or cause to be printed, by any means whatsoever, any advertisement or

notice of the optometry department maintained, operated, or conducted in said establishment or place of business, in which said advertisement or notice appear any untruthful, improbable, impossible, or misleading statement or statements, or anything calculated to mislead or deceive the public. (1919, p. 742; 1935, p. 896.)

* * * * * * *

§210: Repealed by Acts 1965, p. 324, §1, appvd. Aug. 4, 1965

[§211 as amended]

§211. (4387) False or misleading statements in advertisements or circulars.—It shall be unlawful for any person engaged in the practice of optometry in this state to print or cause to be printed, or circulate or cause to be circulated, or published, by any means whatsoever, any advertisement or circular in which appears any untruthful, impossible, or improbable or misleading statement or statements, or anything calculated or intended to mislead or deceive the public. (1919, p. 742; 1935, p. 896; 1965, p. 304, § 2, appvd. Aug. 4, 1965.)

APPENDIX B

TO THE ALABAMA STATE BOARD OF OPTOMETRY
IN RE: DR. J. HARRY SPARKS

I, the undersigned, as President of the Alabama Optometric Association, allege and charge that Dr. J. Harry Sparks a registered optometrist in Alabama, is practicing in violation of the Alabama Optometry Law since August 4, 1965 when Governor George Wallace signed House Bill No. 205, at 11:59 A.M. which House Bill No. 205, among other things, repeals Section 210 of the Alabama Optometry Law as found in title Chapter 11, Sections 190 to 213 inclusive, 1940 Code of Alabama, in that he is operating through a company or corporation, to-wit: Lee Optical Company of Alabama, Inc., and is aiding, abetting and assisting said corporation to unlawfully practice optometry in Alabama by offering to make eye examinations and fit glasses and is receiving pay and financial emolument in return for so aiding, abetting, assisting and making it possible for said corpration to so unlawfully practice optometry in Birmingham (Ensley), Alabama. See exhibits 1, 2, 3 and 4 attached.

I further allege and charge that Dr. J. Harry Sparks is practicing optometry under a false or assumed name to-wit: Lee Optical Company of Alabama, Inc., in violation of Section 191 of the Alabama Optometry Law.

I further allege and charge that Dr. J. Harry Sparks is soliciting the sale of eyeglasses in violation of Section 203 of the Alabama Optometry Law through the advertising campaign as presently conducted on behalf of himself and Lee Optical Company of Alabama, Inc.

I further allege and charge that Dr. J. Harry Sparks is guilty of unprofessional conduct as defined by law in Section 206 of the Alabama Optometry Law in that he is lending his license to Lee Optical Company of Alabama, Inc., and is employing the Lee Optical Company of Alabama,

Inc. as cappers and steerers to obtain business and further that Dr. J. Harry Sparks is splitting or dividing his fee with Lee Optical Company of Alabama, Inc.

I further allege and charge that Dr. J. Harry Sparks received knowledge of the repeal of Section 210 of the Optometry Law by the passage of House Bill No. 205 shortly after August 4, 1965 by a letter from the Alabama Optometric Association and a letter from the Alabama State Board of Optometry, by certified mail, which they sent Dr. J. Harry Sparks advising of the repeal of Section 210 and enclosing a copy of House Bill No. 205 as signed by the Governor and urging his compliance with the Optometry Law as amended.

That because of his willful, continued and unlawful acts and conduct in thus aiding and abetting and assisting a corporation to-wit: Lee Optical Company of Alabama, Inc., to unlawfully practice optometry in Alabama without right to do so and because of the unlawful acts and unprofessional conduct as set out above the said Dr. J. Harry Sparks should have his license to practice optometry in the State of Alabama revoked after due notice and hearing before the State Board of Optometry which hearing is respectfully requested.

Dated this 23rd day of October, 1965

s/ Roy C. Adams
ROY C. ADAMS, O.D.

STATE OF ALABAMA
MONTGOMERY COUNTY

Before the undersigned, notary public, in and for said County and State personally appeared Dr. Roy C. Adams, President, Alabama Optometry Association, who after being duly sworn, deposed and said that the allegations contained in the foregoing charges are true and correct and

acknowledged that he signed the charges voluntarily this the 23 day of Oct., 1965.

s/ Thomas F. Parker
NOTARY PUBLIC

EXHIBIT NO. 1

Act No. 218

Be it enacted by the Legislature of Alabama:

Section 1. Code of Alabama (1940), Title 46, Section 210, is hereby expressly repealed.

Section 2. Code of Alabama (1940), Title 46, Section 211, is hereby amended to read as follows:

Section 211:

"It shall be unlawful for any person engaged in the practice of optometry in this state, to print or cause to be printed, or circulate or cause to be circulated, or publish, by any means whatsoever, any advertisement or circular in which appears any untruthful, impossible, or improbable or misleading statement or statements, or anything calculated or intended to mislead or deceive the public."

Section 3. This act shall become effective immediately upon its passage and approval by the Governor or upon its otherwise becoming a law.

EXHIBIT NO. 2

STATE BOARD OF OPTOMETRY

Dear Fellow Optometrists:

Enclosed you will find a copy of House Bill #205 which was passed by the House and Senate. This bill was signed by Governor George Wallace Wednesday, August 4, 1965, 11:59 A. M.

Your Board of Examiners wants you to know the general guidelines that it has adopted so that you might govern your actions relative to the changes to the Alabama Optometry Law as now amended by House Bill #205.

We have adopted a conciliatory rather than a militant approach in urging all optometrists to comply with the Alabama Optometry Law as now amended.

The Alabama Optometric Association in an effort to offer every assistance in the transition from present working conditions to establishing your own private practice has developed a plan that will be made available to those that desire help. You will very shortly receive a copy of this plan.

Your State Board of Examiners is presently considering adoption of new rules and regulations as authorized under the Optometry Law and by the courts and in doing this they are considering some of the worth while rules and regulations that have been adopted, and approved by the courts, by some of our Sister States. In due course these will be announced.

It is the sincere desire of the State Board of Examiners that every Optometrist promptly comply with the Alabama.

Optometry Law as now amended because the failure to do so will of necessity result in action having to be taken.

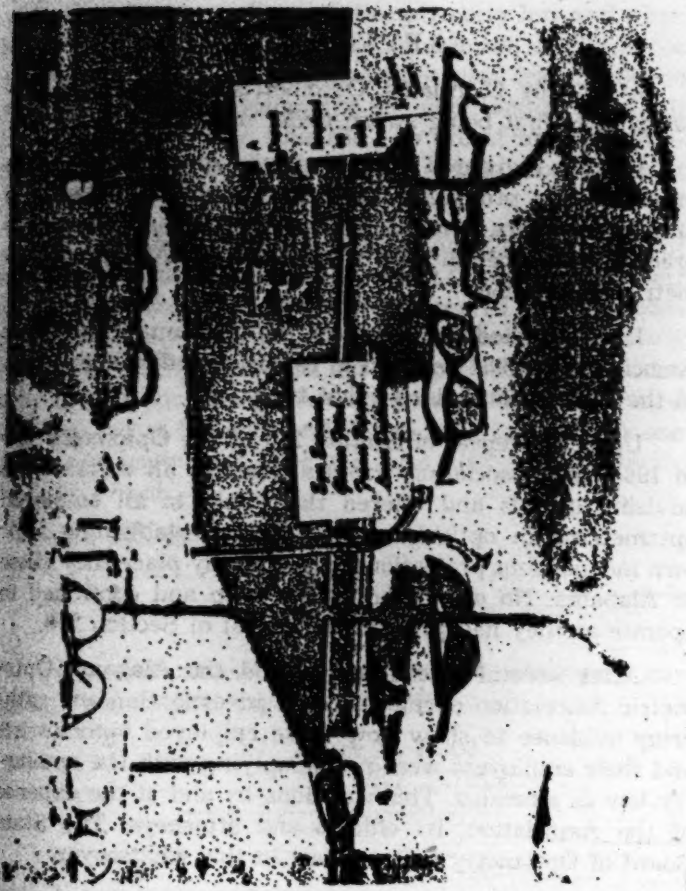
Sincerely,

s/ Willard Smith
Secretary Board of Examiners

EXHIBIT NO. 3



EXHIBIT NO. 4



APPENDIX E

AFFIDAVIT

I, Dr. Roy C. Adams, Optometrist, Monroeville, Alabama, after first being sworn under oath state as follows:

I am a registered optometrist in Alabama and have practiced my profession at Monroeville, Alabama for a number of years. I am and have been since I started to practice a member in good standing of the Alabama Optometric Association.

I was elected president of the Alabama Optometric Association in 1964 and served in various official capacities in the Association prior to that time.

Upon the repeal of Section 210 of the Optometry law in 1965, the Association wrote a letter to all optometrists advising of this and offered their help to all employed optometrists in optical departments in establishing their own independent professional practice any place they chose in Alabama. No one accepted our help and continued to operate as they had prior to the repeal of Section 210.

After several weeks had passed the Alabama Optometric Association decided to start investigating and gathering evidence to show how these employed optometrists and their employers were not complying with the optometry law as amended. This was done by and at the expense of the Association, its officers and attorneys. The State Board of Optometry took no part in this whatsoever.

After our investigation and evidence gathered showed Lee Optical Company and its employed optometrists to be doing the same as before and what appeared to be in flagrant violation of the amended optometry law, we instructed our attorneys to prepare an injunction suit against Lee Optical Company, as well as others so engaged, and

their employed optometrists and also to prepare charges against the employed optometrists setting forth their violation of applicable sections of the optometry law and when this was done, and upon advice of counsel, I signed the charges on October 23, 1965, and they were transmitted to the State Board of Optometry for such action they felt should be taken. At no time did I as president of the Alabama Optometric Association try to dictate what action it should take.

Our attorneys felt the evidence justified the filing of an injunction suit against Lee Optical Company and their employed optometrists—so one was prepared and presented to the State Board of Optometry for their consideration and it was later filed. At no time did I as president of the Alabama Optometric Association try to dictate to the Board that they had to file such an injunction suit or did any one else to my knowledge. The suit was filed voluntarily by the State Board.

Dated this the 2nd day of June, 1971.

s/ Roy C. Adams, O.D.
ROY C. ADAMS, OD

Sworn and subscribed before me the undersigned authority, this the 2nd day of June, 1971.

s/ Bruce H. Hood
NOTARY PUBLIC

APPENDIX F

STATE BOARD OF OPTOMETRY,	)	
Complainant	)	IN THE CIRCUIT
	)	COURT OF
VS.	)	MONTGOMERY
	)	COUNTY, ALABAMA,
LEE OPTICAL COMPANY OF ALABAMA, INC., a corporation,	)	IN EQUITY
	)	CASE NO. 36705
Respondent	)	

DECREE

This is an action by The State Board of Optometry (hereinafter sometimes referred to as "the Board") seeking to enjoin Lee Optical Company of Alabama, Inc., a corporation, (hereinafter sometimes referred to as "Lee") from the unlawful practice of optometry, either directly or indirectly in the State of Alabama . . . from employing by any means or arrangement registered optometrists or physicians, surgeons or oculist to examine the eyes of its customers and prescribe eyeglasses for their 'Lee Optical' stores or any other stores owned by it anywhere in the State of Alabama . . ." The Bill of Complaint also prayed for process and for general relief. Originally thirteen licensed optometrists and one physician were included as Respondents, but they have been eliminated as parties by a previous order of this Court.

The questions of whether the Board has authority to maintain this action and whether injunction is the proper remedy have been settled by the Supreme Court of Alabama in a previous appeal in this case. *State Board of Optometry* vs. *Lee Optical Company of Alabama, Inc.*, 284 Ala. 562; 226 So. 2d 623.

This cause was submitted for final decree upon the pleadings as amended and testimony taken ore tenus and both parties have filed briefs. Subsequent to submission, Respondent filed a Motion To Set Aside Submission. Upon consideration of the pleadings as amended and the testimony, the Court makes and enters the following finding of facts:

FINDING OF FACTS

1. That the Board was legally and duly created and constituted and is presently functioning pursuant to Chapter 11, 1940 Code of Alabama, as amended, and is authorized to hold examinations and grant licenses to practice optometry in Alabama; and that at the time this action was filed Dr. Thomas S. Gibson, Huntsville, Alabama, was President; Dr. Willard Smith, Eufaula, Alabama, was Secretary, and that together with Dr. James L. Cash, Selma, Alabama; Dr. George W. Posey, Jasper, Alabama, and Dr. George R. Carlton, Alexander City, Alabama, they constituted the duly appointed and qualified members of the State Board of Optometry.

2. That Lee is an Alabama corporation; that it operates some fourteen stores for the sale of eyeglasses throughout Alabama under the trade name of "Lee Optical", one of which is located at 6 Dexter Avenue, Montgomery, Alabama; and that it also operates other stores for the sale of eyeglasses in Alabama under other trade names.

3. That at the time this action was filed and at all times from then until April 1, 1970, it was the policy and practice of Lee to employ under written contracts of employment and on a salary basis, licensed optometrists and physicians, and that insofar as it was possible to do so, Lee did employ such optometrists and physicians to work for it in its respective "Lee Optical" stores and other stores in Alabama to examine the eyes of and to prescribe glasses for its customers; that under such contracts of employment, the

optometrists and the physicians employed by Lee were under the control of Lee and a supervisor employed by Lee; that the contracts of employment of such optometrists and physicians were terminable by Lee without any notice; that the records maintained by such optometrist and physician employees on patients or customers became and were the property of and under the direction and control of Lee; that under the terms of said contracts of employment the optometrist and physician employees of Lee were specifically required to refrain from any action deleterious or harmful to Lee; that such contracts of employment provided for fringe benefits, including two weeks paid vacation; a profit sharing and pension retirement plan; and group hospitalization and life insurance.

4. That the 1965 Legislature of Alabama through Act No. 218, which was signed by the Governor on August 4, 1965, repealed Section 210 and amended Section 211 of Title 46, Code of Alabama (hereinafter sometimes referred to as "Section 210" and "Section 211" respectively).

5. That subsequent to the repeal of Section 210, the Secretary of the Board notified all optometrists in Alabama, including the optometrist employees of Lee, of the repeal of Section 210.

6. That at the time Section 210 was repealed and for some period of time subsequent thereto, Lee conducted an advertising program under Lee's respective trade names wherein the phrases "Eyes Examined" and "Glasses Fitted" were used; wherein it was sometimes stated that one price included among other things "Your Scientific Examination"; and whereby, generally, the public was led to believe that Lee was qualified to practice optometry; that in some such advertising the names of the optometrist employees of Lee were used, and in some advertising such names were not used; that this advertising program was generally similar for all stores operated by Lee in Alabama; and that at some time subsequent to the repeal of Section 210 and prior

to the trial of this cause, the advertising program of Lee was altered, but to an immaterial extent.

7. That at the time this suit was filed and at all times from then until April 1, 1970, the operation of its stores in Alabama by Lee was essentially the same; that when a prospective purchaser entered a store, he was ushered by a Lee employee into the office or space occupied by the optometrist employee serving that store; that such optometrist employee made a minimal examination of the eyes of said customer and wrote a prescription for glasses; that no fees were charged by the optometrist employees for such examination; that then Lee, through its servants, agents and employees, including the optometrist employees, immediately attempted to make a sale of eyeglasses to the customer; that all patient's and other records were kept and maintained by and were under the direction and control of Lee; that all money involved in the transaction was handled by Lee; that by the very nature of the employment contracts involved, the primary concern of the optometrist employees of Lee was the sale of eye-glasses rather than the welfare of the customers; that prescriptions were written and the sale of glasses were made using documents which bore the name of "Lee Optical"; that as a result of the arrangement between Lee and its optometrist employees and Lee's advertising program, the public was mislead and deceived into believing that Lee was and is qualified to make eye examinations; and that Lee, through its optometrist employees, was making eye examinations and prescribing glasses as well as selling them.

8. That on April 1, 1970, (which was approximately five years after the repeal of Section 210 and shortly prior to the trial of this cause) Lee cancelled its written employment contracts with the optometrist employees serving its stores and entered into a "Lease" agreement whereby it purported to lease space in its respective stores to the optometrist employees serving such stores; that the change of status of the optometrist from that of "Employee" to

"Lessee", was accomplished primarily by telephone; that none of the optometrist employees objected to this change in status; that by such change in status, the optometrist employees gave up the fringe benefits contained in their previous contract of employment; that subsequent to the change of status of the optometrists serving Lee stores from that of "Employees" to that of "Lessee" on April 1, 1970, the only visible difference in the operation of the stores of Lee from the operation of such stores prior to April 1, 1970, was that there was added to Lee's sales documents a charge for eye examinations; that under the lease arrangement, Lee furnishes space "together with adequate and sufficient opthalmic equipment necessary and required . . ." for the optometrists to examine eyes at Lee's stores; that although separate fees are itemized for eye examinations, Lee collects for the eye examination at the time glasses are sold or are paid for and remits to the optometrists on a semi-monthly basis, all such fees collected; that said lease arrangements contained provisions whereby the "lease" can be cancelled upon 10 days notice.

9. That the modern accepted minimum eye examination taught in optometry schools and practiced by the profession consists of essentially five parts:

(1) Case History; (2) Examination of the Outer Eye; (3) Examination of the Inner Eye With an Opthalmoscope; (4) A Refraction; and (5) a Glaucoma Test; that depending upon the assistance available to the optometrist, such a minimum examination takes at least 20 to 30 minutes; that the optometrist employees and lessees of Lee did not and do not conduct such a minimum examination; that basically those optometrists perform only the refraction; that the refraction is the step in the examination that may result in a prescription for eyeglasses; that the average time required for a customer to enter one of Lee's stores, be ushered into the office of the optometrist employee (or lessee), have an examination; and be sold a pair of glasses is 7 to 10 minutes.

OPINION

The Court is convinced that the overriding question in this case is the effect of the repeal of Section 210 and the amendment of Section 211 in August, 1965. Prior to this legislative action, the employment of a duly licensed optometrist by a corporation (or a person or firm) was clearly authorized by the statutory law of Alabama and upheld by the courts. *Alabama State Board of Optometry* vs. *Busch Jewelry Company*, 261 Ala. 479, 75 So. 2d 121; *Busch Jewelry Company* vs. *City of Bessemer*, 269 Ala. 180, 112 So. 2d 344; and *McCrory* vs. *Wood*, 227 Ala. 426, 171 So. 2d 242.

Optometry is one of the emerging professions in the health care field. The weight of modern authority is in favor of the legal consideration of optometry as a profession as distinguished from a trade or business (88 ALR 2d 1290 etc.) In a Mississippi case (*Sears Roebuck* vs. *State Board of Optometry*, 213 Miss. 710, 57 So. 2d 726); the court stated:

> "The practice of optometry is undoubtedly one of the subdivisions of the practice of medicine, which have arisen in modern times by reason of the necessity for specialization. It would seem that the public has as much need to be protected from quacks and charlatans in optometry as in dentistry or any other subdivision of medicine."

The Alabama Supreme Court in *Hampton* vs. *Brackin's Jewelry and Optical Company*, 237 Ala. 212; 186 So. 173, followed the weight of authority in categorizing the practice of optometry as a profession when it said:

> "It cannot be doubted for a moment that the practice of optometry bears a direct and substantial relation to the public health, and that it calls for special skill and knowledge on the part of those practicing it. It was for this reason, no doubt, that the Legislature undertook to legislate upon the subject, that the public might be

protected from fakers and incompetence. We know from common experience that there are many distressing troubles which are attributable to defective eyesight, and which may be cured, or relieved, by properly fitted glasses."

The court further added:

"The Legislature recognizes the fact that no one, without the requisite skill and knowledge, should be allowed to practice optometry . . ."

The court then further said:

"Thus it would appear that the Legislature has seen proper to recognize and regard optometry as a profession, one requiring knowledge of the functioning of the eye, its anatomy, and of pathology as applied to optometry.

"When the optometrist undertakes to make an examination of the eye, with a view of determining whether glasses will be of aid to his patient, he must, of course, bring to bear, in making such examination this professional, or scientific skill, and knowledge, and he can not be directed by his employer, who has no such knowledge. He acts, and must act, in such matters, as his skill and knowledge and independent judgment suggest is the proper course to be pursued."

In spite of the Supreme Court's recognition of optometry as a profession in *Hampton*, it was bound by the statutory law of this state. Prior to the repeal of Section 210 the Court held in three separate cases that neither by Board regulation, city ordinance or ethical code could an attack on corporate practice of optometry be sustained so long as Section 210 was in effect. *Busch Jewelry et al.* vs. *Alabama State Board of Optometry*, supra, *Busch Jewelry* vs. *City of Bessemer*, supra and *McCrory* vs. *Wood*, supra.

Prior to August 4, 1965, Sections 210 and 211, expressed a legislative intent contrary to the law of a majority of the states and contrary to modern philosophy by expressly authorizing the commercialization of the practice of optometry in allowing "any person, firm or corporation" to practice optometry through the employment of a duly licensed optometrist.

This court is convinced that the repeal of Section 210 and the amendment of Section 211 was a recognition by the Alabama Legislature that this state was out of step with the rest of the nation in dealing with the profession of optometry, and that it was not in the best interest of Alabama citizens to maintain the statutory distinction between the practice of optometry and the other professions in the health care field.

This action by the Legislature taken in the light of the two *Busch* cases and the *McCrory* case seems to declare a public policy against the corporate practice of optometry, whether it be direct or by indirection. It must be assumed that the Legislature, in repealing Section 210 and amending Section 211 took into consideration the following statement by the Alabama Supreme Court in *Busch Jewelry et. al.* vs. *Alabama State Board of Optometry:*

> "If there is to be a change in the Legislative policy therein expressed, (Sections 210 and 211) that is a matter for legislative action."

The general rule regarding the corporation practice of optometry is:

> "It is generally held that in the absence of express statutory authority, a corporation may not engage in the practice of optometry either directly or indirectly through the employment of a duly registered optometrist." *13 Am Jur,* Corporations, Section 837.

The Court feels that this role holds twice true when such "express statutory authority" is repealed by the Legislature, in the face of court decisions expressly construing the statute to allow such practices.

In 1969 the Alabama Legislature took another giant step forward by granting further prominence to the profession of optometry through the establishment of a School of Optometry at the University of Alabama in Birmingham.

In light of the action of the Alabama Legislature as described and the status of the profession of optometry in other states, this court is not impressed with the efforts of Respondent at the trial to degrade the profession of optometry. An optometrist, like a dentist, or a physician, has a relationship with his patients that cannot be nurtured in the market place. One who consults an optometrist for ocular examination is entitled to the same undivided loyalty that he should receive from a physician. If an optometrist is the employee of an optical concern whose main interest is the sale of optical goods, such relationship tends to be a distracting influence which may adversely affect his loyalty to the interests of his patient. Surely an optometrist should be absolutely independent of everything and everybody except his profession and the people who confidentially depend upon him to aid them in improving and preserving their sight.

The Court is, however, impressed with the efforts of the State Board of Optometry and individual practitioners to improve and upgrade the profession of optometry. Apparently the Alabama Legislature has joined in this movement. This Court can do no less.

The Court holds that the action of the Alabama Legislature in repealing Section 210 and amending Section 211, terminated the right that Lee had to conduct an optical dispensing business with the aid and assistance of an optometrist employee. There is no longer in Alabama statutory authority for a person, firm or corporation to operate a

business wherein eyes are examined and glasses are fitted even with a licensed optometrist on the premises, and the Court holds that it is unlawful for Lee to do so or to advertise to the effect that it is qualified to do so.

Notwithstanding the repeal of Section 210, Lee continued to operate its stores throughout Alabama with the assistance of employed optometrist until April 1, 1970.

The circumstances surrounding the change of the modi operandi of Lee on April 1, 1970, convinces the Court that this action was simply a subterfuge engaged in between Lee and its former employees to continue their former unlawful arrangement through a sham lease arrangement.

The ease with which Lee was able to convert its employment contracts with its optometrists into leases; the lack of objection on the part of the optometrist employees to giving up fringe benefits; the similarity in the operation of the stores before and after the change; the continuation of the minimal eye examination by the optometrists, and the retention by Lee or the right to terminate the "Leases" on short notice, indicate a continuing control by Lee over its optometrists that is not commensurate with the freedom necessary for a professional person to concern himself primarily with the best interests of his patients. The fact that Lee continued to operate under its employment contracts for nearly five years after the repeal of Section 210 and until shortly prior to the trial of this cause does not speak well of its good intentions.

There are many cases in other states where corporations unlawfully engaging in the practice of optometry through employees attempted to circumvent the law with "lease" arrangements. In the Ohio case, *Rowe* vs. *Standard Drug Company*, 132 Ohio St. 629, 9 N.E. 2d 609, wherein an employment arrangement was changed to a lease arrangement the court stated that it was not limited to the terms of the lease, but would consider the manner in which the optical business was conducted and the extent to which the

corporation participated in transactions involving optometrists. That Court said:

> "Of course a lease, valid on its face, may be a mere sham or device to cover up the real transaction; but such a subterfuge will not be permitted to become a cloak for illegal practices. The Courts will always pierce the veil to discover the real relationship. Where a corporation directly or indirectly engages in the practice of optometry the lease will afford no protection on a proper challenge of the illegality."

In years gone by there are many reported cases which show that the professions of medicine and law had to resort to courts of equity to enjoin and stop commercialists who would debase those professions for personal profit with little or no regard for the welfare of the public. In more recent times, the profession of dentistry had to follow that same trail. The profession of optometry is now involved in a similar battle. This Court has no alternative under the law but to assist this effort.

It is therefore CONSIDERED, ORDERED, ADJUDGED and DECREED as follows:

1. That the Motion To Set Aside Submission heretofore filed by Respondent be, and the same is hereby denied.

2. That Lee Optical Company of Alabama, Inc., be and it is hereby enjoined, restrained and prohibited from engaging in the practice of the profession of optometry, either directly or indirectly, and from employing, by any means, whether directly or indirectly, licensed optometrists or physicians to examine the eyes of its customers and prescribe eyeglasses for them.

3. That Lee Optical Company of Alabama, Inc., be, and it is hereby further enjoined, restrained and prohibited from keeping optometrists, whether by contract of employment, by lease agreement or device, in its places of busi-

ness in Alabama for the purpose of examining the eyes of and prescribing eyeglasses for its customers.

4. That Lee Optical Company of Alabama, Inc., be and it is hereby further enjoined, restrained and prohibited from showing on its store fronts or in any other advertising elsewhere by whatever means, the name of any optometrist or physician and from using in any such advertising phrases "Eyes Examined," "Glasses Fitted," "Your Scientific Eye Examination," and from using in any such advertising, any other words, phrases or expressions which will in any way indicate to the public that it is qualified to or will examine eyes or fit glasses or which would tend to indicate to the public that Lee will or is qualified to examine the eyes of its customers or fit eyeglasses for them in connection with the sale of its eyeglasses.

5. That Lee Optical Company of Alabama, Inc., be and it is hereby further enjoined, restrained and prohibited from making any arrangement with any optometrist or physician whereby it would refer its customers to such optometrist or physician or whereby such optometrist or physician would refer their patients to Lee, for the specific purpose of promoting the sale of Lee's eyeglasses, regardless of where such optometrist or physician is located.

6. That Lee Optical Company of Alabama, Inc., be and it is further enjoined, restrained and prohibited from making referrals of customers to any specific eye specialist or indicating the possible convenience of a nearby eye specialist.

7. That this decree be and the same is hereby made applicable to all officers, agents, servants and employees of Lee Optical Company of Alabama, Inc.

8. That it is not the intention of this Court through this decree, and the same will not be construed, to enjoin Lee Optical Company of Alabama, Inc., from pursuing the trade or business of a dispensing optician, so long as it does

so in a lawful manner and so long as it does not attempt to unlawfully practice optometry through its agents, servants or employees, or through any other arrangement, either directly or indirectly, anywhere in the State of Alabama in any establishment owned or controlled by or in any manner connected with it.

9. That, this decree constituting a prohibitory injunction and not coming within the provisions of Title 7, Section 793-795, Alabama Code, the Respondent will not be allowed to supersede this decree pending any appeal herefrom. (Stricken by Amendment and Supersedeas granted.)

10. That the Respondent, Lee Optical Company of Alabama, Inc., be and it is hereby taxed with the costs herein accrued for which let execution issue.

Done this 17 day of March, 1971

/s/ RICHARD EMMET
CIRCUIT JUDGE IN
EQUITY SITTING

Alton L. Turner
Luverne, Alabama

Thomas F. Parker
10 High Street Building
Montgomery, Alabama

Richard A. Billups, Jr.
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Lee Optical Company of
Alabama, Inc., A
Corporation

APPENDIX C

STATE BOARD OF OPTOMETRY COMPLAINANT	)	CIRCUIT COURT, TENTH JUDICIAL CIRCUIT OF ALABAMA EQUITY DIVISION
VS.	)	
HOUSE OF $8.50 EYE-GLASSES INC. a corporation, et al RESPONDENTS	)	CASE NO. 159-616

FINAL DECREE

This cause was originally filed and several preliminary pleadings were filed and determined in the Bessemer Division of this Court. Later, the cause was transferred to this division. An extended oral hearing was held in this division to the merits of the cause before another judge who took the matter under submission under a note of testimony filed in Open Court on July 14, 1970. On July 6, 1971, the cause was refiled and resubmitted to the undersigned judge. As to the validity and propriety of the rulings upon pleadings anterior to this instant Final Decree, this Court will consider itself bound, and particularly, because there has been no re-presentation or objection thereto by counsel for the several parties.

This cause presents a justifiable controversy properly filed and heard and determined in a Court of Equity. The prayers of the Bill of Complaint as finally amended are, essentially, as follows: First, that the Respondent Corporation as it acts through its departments and agents in the employment of registered optometrists, physicians, surgeons or oculists to examine the eyes of its customers and prescribe eyeglasses is an unauthorized and unlawful practice of the profession of optometry as defined in the statutes and the case law applicable thereto in the State of Alabama; and, second for a prohibitory injunction against all Re-

spondents in the cause from any unlawful practice of optometry, either directly or indirectly in the State of Alabama and the corporate Respondent particularly from employing by any means or arrangement registered optometrists or physicians, surgeons or oculists to examine the eyes of its customers and to prescribe eyeglasses therefor anywhere in the State of Alabama; and third, for general relief.

The Court has been furnished with briefs by counsel and has carefully reviewed the multitude of cases in this jurisdiction and throughout the United States relative to the issues posed by the pleadings in this cause, and particularly the statutes which treat the profession of optometry.

There would be no particular virtue in a recitation of the evidence and any findings of fact by the Court, except that the Court does find, that as hereinafter set forth, Complainant, State Board of Optometry, is, substantially, entitled to the specific reliefs prayed.

Accordingly, it is CONSIDERED, ORDERED, ADJUDGED AND DECREED as follows:

ONE: That House of $8.50 Eyeglasses, Inc., a corporation is hereby enjoined from, either directly or indirectly, employing by any means or arrangment registered optometrists or physicians, surgeons or oculists to examine the eyes of its customers and to prescribe eyeglasses therefor anywhere in the State of Alabama.

TWO: All individual Respondents are hereby enjoined from any unlawful practice of optometry, either directly or indirectly, in the State of Alabama.

THREE: That the House of $8.50 Eyeglasses, Inc., a corporation in its employment through its departments and agents of registered optometrists, physicians, surgeons or oculists to examine the eyes of its customers and to prescribe eyeglasses for them is an unauthorized and unlawful

practice of the profession of optometry as defined in the laws and statutes of the State of Alabama.

FOUR: The Respondent, House of $8.50 Eyeglasses, Inc., is hereby taxed with the costs of this action, for which let execution issue.

DONE and ORDERED this the 8th day of July, 1971.

/s/ Wm. P. Barber
CIRCUIT JUDGE IN EQUITY SITTING

cc: Hon. Thomas F. Parker
Hon. Richard A. Billups, Jr.
Hon. Lee Baines
Hon. William G. West

APPENDIX B

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APPENDIX I

AFFIDAVIT

I, Dr. James L. Cash, Optometrist, 12 Broad Street, Selma, Alabama, after first being duly sworn under oath states as follows:

I am a registered optometrist in Alabama and have practiced my profession in Selma, Alabama, for over twenty (20) years. I am, and have been since I started to practice, a member in good standing of the Alabama Optometric Association.

I was appointed to serve as a member of the Alabama State Board of Optometry in 1956 and served continuously until early 1971 when my successor was appointed upon the expiration of my then current term. I have served as long if not longer on the Alabama State Board than any other optometrist.

It is an unwritten understanding when a member of the Alabama Optometric Association is appointed to the State Board that he will no longer take an active part in Association activities or accept an office of officer in the Association because many years ago and prior to 1955 it became clear, and we were so advised by legal counsel, that the members of the State Board, in addition to conduction examinations of new licenses, we would be called upon to hear and decide any charges against an optometrist that might be filed and therefore should take no part in or advise any one with reference to any such charges because it was the duty of the Board members to refrain from reaching a decision on any such matter until it was heard by the Board, as provided in the Alabama Optometry Law, after which the Board members would then decide the matter.

About the same time the Association members were made aware of the responsibilities of the State Board mem-

bers and that they, individually or an an association, would have to assume the responsibility of making investigations that might lead to the filing of charges against an optometrist and if any such were to result in charges it would be up to the Association members or officers to prepare, document, and file them with the State Board. It then became the Board's decision as to further action, if any, to be taken by the Board, including the scheduling of a hearing as provided in the Alabama Optometry Law.

At no time since the charges were filed with the Board against the optometrists then employed by Lee Optical Company in 1965 has the Alabama Optometric Association or any member thereof, tried to dictate or even suggest to the State Board how these charges would be handled or action to be taken by the Board on them.

I was president of the State Board during most of the last two years. I served on the State Board and sat through the trial of the Lee case before Judge Emmet as representative of the State Board. With reference to the Lee suit and others filed by the State Board, all of the investigation, taking of pictures, affidavits of prospective witnesses and all acts taken in the investigation of Lee and other companies with reference to their compliance with the Alabama Optometry Law, after the repeal of Section 210 thereof, was conducted by the Alabama Optometric Association and its officers and at its expense, a bill of complaint against Lee Optical, together with exhibits attached, was then presented to the State Board for their consideration in filing it. The Board decided it should be filed and this was done without the Board reaching a conclusion as to the merits of the charges.

The State Board decided it would be helpful in hearing and reaching a decision on the charges filed against the individual optometrists to wait until one of the lawsuits was tried since any such court decision would serve as a guide for the Board. The individual optometrists were then

notified of and furnished a copy of the charges, and told they would be advised later of the time and place for a hearing as provided by the Optometry Law.

Shortly prior to the trial in State court of the Lee case, the charges against the optometrists employed by Lee were scheduled for hearing and upon being assured by their counsel in a letter to our attorney that the Board members would not be challenged for cause for participating in the trial, the hearings were continued. No Board member took or was called to the witness stand in the Lee trial. After the Lee case was decided by Judge Emmet these charges were again scheduled for hearing and upon the filing of the suit in Federal Court our counsel readily agreed to voluntarily continue them again to await a decision on the motion for a temporary restraining order and on the motion to dismiss filed by the defendants.

Dated this the 2nd day of June, 1971

s/ James L. Cash, OD
JAMES L. CASH, OD

Sworn and subscribed before me the undersigned authority, this 2nd day of June, 1971.

s/ Joyce Robinson
NOTARY PUBLIC

APPENDIX J

ALABAMA STATE BOARD OF OPTOMETRY

Office of the Secretary
P. O. Box 286
Eufaula, Alabama, 36027

July 9, 1971

To ALL ALABAMA OPTOMETRISTS:

Your attention is invited to the enclosed Regulation #1 of 1971 recently adopted by the State Board of Optometry. This is for your information.

Sincerely yours,

s/ Willard Smith
Secretary

ALABAMA STATE BOARD OF OPTOMETRY

Office of the Secretary
P. O. Box 286
Eufaula, Alabama 36027

MINUTES OF THE STATE BOARD OF OPTOMETRY

Regulation No. 1—1971

Pursuant to Section 194, Title 46 of the Alabama Optometry law, it is made the duty of the Alabama State Board of Optometry to make regulations as provided therein and pursuant thereto the State Board of Optometry in session duly assembled, on this 13th day of June, 1971, in the City of Montgomery, Alabama, there being a quorum present and participating duly adopted the following regulation to be known as Regulation No. 1, 1971:

Since Section 206, Title 46 of the Alabama Optometry law provides for an appeal in cases of suspension or revoca-

tion of a license holder, after a hearing before the Board as provided in said Section 206, the holder may appeal to the Circuit Court, or other court of like jurisdiction, in the county in which the person whose license or certificate is ordered revoked or suspended resides but failing to specify the procedure by which any such appeal will be accomplished, the Board adopts the following with reference to any such appeal:

When a license holder desires to appeal from any holding or decision made by the State Board in a case against him, he shall within 15 days from the date such decision is announced by the Board file in writing with the Secretary of the Board notice of his intention to appeal. He shall have thereafter 30 days in which to prepare a transcript of the proceedings against him including any testimonies for filing with the Circuit Court in the county of his residence and if the reporter is unable to prepare the transcript within this time he shall make application to the president of the Board for additional time, in a reasonable amount, and said extension shall be approved. Thereafter when the transcript is so filed the appeal will be perfected to await the decision of the Circuit Court. Any appeal from the decision of the Circuit Court will be made to the Appellate Court of Alabama in the manner now provided by law for the appeal of equity cases. From the time the decision of the State Board of Optometry is announced and while an appeal is pending in the courts awaiting a final decision, the execution of any revocation of license or suspension thereof will be stayed and no action to enforce same will be taken by the State Board of Optometry. If at any time an appeal is abandoned or not pursued as provided herein and by law the Board will then be free to give 10 days notice to the license holder of such abandonment of his appeal and if said appeal is not reinstated or perfected as provided by law the Board can then take such action as it deems necessary to carry out the decision it had formerly announced following the hearing before it. Also if the decision of the

Board is finally affirmed on appeal the Board will then notify by registered mail, return receipt requested, the license holder of its action to be taken to enforce its decision and give him 30 days within which to comply therewith.

The Board took up the further matter of the Bill of Complaint for an injunction having been signed and verified by Dr. Thomas Gibson, then President of the State Board of Optometry and presently a member thereof, and concluded that if an optometrist who was a named defendant in any such suit and against whom charges were pending before the Board to revoke his license challenged Dr. Gibson for cause to sit as a member of the Board hearing charges against him, the Board now feels it would be proper for it to sustain such challenge and Dr. Gibson would be excused and the charges heard by the remaining Board members, not challenged for cause and excused so long as a quorum remained was present so the Board could function as such, would proceed to a hearing on the charges as provided in Section 206, Title 46 of the Alabama Optometry Law.

Certified as a true copy—

/s/ E. E. Ashbee
E. E. Ashbee, OD
President of the Board

APPENDIX K

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA,
NORTHERN DIVISION

L. M. BERRYHILL, et al.	)	
	)	
Plaintiffs	)	
	)	CIVIL ACTION
Vs.	)	NO. 3339-N
	)	
THOMAS S. GIBSON, et al,	)	
	)	
Defendants	)	

STIPULATION

It is stipulated by and between the parties as follows:

1. Paragraphs 2, 3 (a), 3 (c), 4, 5 and 6 are admitted by all of the parties, both plaintiff and defendant.

2. At the time notice of the August 1970 hearings were given plaintiffs demanded that the respondent State Board of Optometry recuse itself, a copy of the demand being attached hereto as Exhibit 1. Subsequently the August hearing was postponed by mutual agreement of the plaintiffs and defendant State Board with the stipulation that neither party's position would be altered by so doing. This agreement is set out as Exhibit 2.

3. Plaintiff optometrists are all licensed, practicing optometrists in the State of Alabama. In October of 1965 when the original charges were preferred against them, they were all employees of Lee Optical Company of Alabama, Inc., a corporation. Lee Optical Company of Alabama, Inc. is a corporation engaged in the business of optical dispensing. It sells eyeglasses at an advertised price. Prior to October 1965 Lee advertised eyeglasses, advertised that it *conducted* or *furnished* eye examinations by a

registered optometrist on its premises. Exhibit 3 depicts advertisements and photographs of Lee's premises showing the advertising conducted upon its premises. The optometrists employed in the Lee stores were employed on a salary. No charge was made for eye examinations except instances where the patient did not need eyeglasses. In those instances a nominal charge was made for the examination which went into Lee's receipts with the optometrist getting no part of it. A copy of the employment contract in use between Lee and its optometrists at the time of the filing of the charges against the Lee optometrists is attached hereto as Exhibit 4 with deposition testimony of Dr. William B. McCrory who identified the employment contract.

4. In October of 1965 Lee modified its advertising program by taking out of any advertisements any references to optometrical examinations or optometric services. Its ads were directed toward the advertisement of eyeglasses. A copy of the ad in use which is typical of those used since October 1965 is attached hereto as Exhibit 5. The store windows of Lee Optical do not contain any reference to an optometrist or that an optometrical examination is available inside the store.

5. In April 1970 Lee entered into a new agreement with its optometrists, a copy of which is attached hereto as Exhibit 6. This agreement in substance allowed the optometrist to lease the optometrical office and equipment from Lee, to occupy the space therein for the purpose of conducting eye examinations and to set his fee. Arrangements were made whereby the Lee clerical help collects the fees which are charged, posts them on a balance sheet and Lee remits the fees to the optometrist. There is no other pecuniary arrangement between the optometrist and Lee. All pension plans, withholding tax arrangements, group insurance plans and other employee benefits which had been available to the optometrists through Lee were discontinued as of April of 1970.

Under the present arrangements the optometrist conducts examinations in the leased premises within the Lee Optical dispensary. He does not pay any rent. The consideration to Lee is the availability of an optometrist to examine eyes of patients who come in without prescriptions for glasses. Lee receives no part of the fee for the optometric examination and the optometrist receives nothing from Lee by way of remuneration because of the sale of a pair of eyeglasses. The additional examination fee is now paid by the customer who comes in.

The optometrists in the Lee Optical stores do not advertise optometrical examinations. There is no reference in Lee advertising to the fact that there is an optometrist in the office or on the premises.

6. Defendants Gibson, Ashbee, Carlton, Warr and Smith, members of the State Board of Optometry of the State of Alabama are also members of the Alabama Optometric Association. Dr. Thomas S. Gibson was a member of the Legislative Committee of the State Association in 1965 and also a member of the Board of Optometry. As President of the Board of Optometry he signed the complaint in a civil suit, the complaint in which is attached as Exhibit 7 by which he made affidavit as to the truth of certain charges against plaintiffs. Board members at the time of the filing of the complaint against plaintiffs were defendants Thomas S. Gibson, E. E. Ashbee, George R. Carlton, Willard Smith and James L. Cash.

7. The Alabama Optometric Association consists of approximately 100 members. The dues paid by each member are $240 per year; of this $140 goes to the American Optical Association. These dues are used to finance the Association's activities and also to defray legal expenses of investigating and initiating charges against plaintiffs in this action. The Alabama Optometric Association has for several years been interested in eliminating "corporate practice" which the plaintiffs are alleged to be engaged in

by being employed by Lee Optical Company or *by practicing on its premises.* In 1965 the Alabama Optometric Association was active in securing the repeal of Section 210 of Title 47 of the Optometry Code of the State of Alabama. This was the section which allowed and required any optical dispensary in which eyes were tested to be under the supervision of a registered optometrist. Defendants Gibson, Carlton, Smith, Ashbee and Warr contributed to a legislative fund raised by the Alabama Optometric Association to promote the repeal of these sections, the repeal of which allegedly makes the practice of plaintiffs illegal.

8. The State Board of Optometry has no rules or regulations governing the practice of optometry within the State of Alabama. The charges pertaining to the plaintiffs in this instance involve an alleged violation of the State Code regulating the practice of optometry as it presently exists.

9. It is stipulated by and between the parties that Section 210 of Title 47 was repealed August 4, 1965, that charges were initiated by the Alabama Optometric Association against plaintiffs and filed with the State Board October 23, 1965, a copy of the said charges made against each optometrist being the same as Exhibit 8 hereto made against Dr. Harry Sparks, that civil suit was filed by the State Board against plaintiffs and Lee Optical on October 25, 1965, a copy of the complaint and exhibits thereto being attached as Exhibit 7.

10. Attached to the original of this stipulation are depositions of Dr. William B. McCrory and members of the State Board of Optometry taken May 21 and 22, 1970 and it is stipulated that the parties would so testify in this action.

11. It is further stipulated by and between the parties that if the individual members of the State Board of Optometry were called to testify that each of them would testify that he was not prejudiced against plaintiffs and in his judgment could render a fair and impartial verdict on the charges brought against them.

12. It is further stipulated that each of the plaintiffs, if called to testify, would testify that Lee Optical Company of Alabama, Inc. had never interferred with his professional practice, called upon him to alter his judgment and that his professional judgment was in no way affected or impaired, nor was his allegiance to his patients impaired or affected by reason of the fact that he practiced on the premises of a dispensing optician.

13. Mr. Gene Shanbaum of Dallas, Texas, Secretary of Lee Optical Company, testified in the trial of *State Board* v. *Lee* in the Circuit Court of Montgomery County that he had checked the records of Lee Optical and that in 1969 Lee sold 75,000 pairs of glasses in Alabama.

14. The Alabama Legislature created the School of Optometry in 1968 to be located in the Medical Complex of the University of Alabama at Birmingham and it is now in its second year of teaching optometry students.

15. Drs. Pillion and Sparks, who had formerly been employees of Lee and now practice as lessees on Lee's premises, testified in the *State Board* v. *Lee* trial that they made more money as lessees of Lee under their present arrangement than they had as a salaried employee for Lee.

16. Dr. Milton E. Warr was appointed to the State Board of Optometry on or about January 1, 1971 and prior to that time had no contact with the charges against the plaintiffs or the suit against Lee Optical Company.

17. The employment agreement which Lee had with its optometrists prior to April of 1970 and the lease arrangement presently in use both contain a 10 day cancellation clause.

18. If called to testify Dr. George R. Carlton, a member of the State Board, will testify that by-laws of the Association provide that the Association recommend names to the Governor for appointment to membership on the State Board. The Association in years past has made this

recommendation, but has rarely been followed by the Governor. In recent years no recommendation has been made. None of the present Board members were recommended by the Association for appointment. There is no provision in the optometry law which allows the Association to nominate Board members.

19. There is no provision in the optometry laws or elsewhere for the appointment of a new Board if the present Board is enjoined from hearing pending charges.

20. The House of $8.50 Eyeglasses has now been decided by the Circuit Court in Birmingham and is in the process of being appealed; a copy of the Circuit Court decree is attached as Exhibit 9.

21. Section 210 of the optometry law was repealed on August 4, 1965. There was no change in the signs and advertising done in all the Lee stores until after the charges here involved were filed on October 23, 1965 and the suit filed against Lee and its optometrists several days later.

22. The State Board of Optometry adopted Resolution No. 1 on June 13, 1971; a copy of the Resolution being attached hereto as Exhibit 10.

23. All exhibits attached to pleadings, briefs or other documents heretofore filed with the court are admitted as to genuineness and what they purport to be for the convenience of the court; however, by admission of documents or this stipulation, neither of the parties admit the relevance thereof as to the issues.

s/ Douglas E. Bergman
Douglas E. Bergman

s/ Harry Cole
Harry Cole

Attorneys for Plaintiffs

s/ J. G. L. Marston III

s/ Donald G. Valeska II
Deputy Assistant
Attorneys General

s/ Richard A. Billups, Jr.
Richard A. Billups, Jr.,

Attorney for Defendants

APPENDIX L

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA NORTHERN DIVISION

FILED
Jul. 30, 1971
JANE P. GORDON, Clerk
By _____
Deputy Clerk

L. M. BERRYHILL, ET AL,)
)
Plaintiffs,)
) CIVIL ACTION
VS.) NO. 3339-N
)
THOMAS S. GIBSON, ET AL,)
)
Defendants.)

ORDER ON PRE-TRIAL HEARING

This cause coming on to be heard on a regular pre-trial hearing and all parties being present in person or by counsel, the following action was thereupon taken:

1. The following pleadings and amendments were allowed: the complaint and amendment thereto; Defendants' motion to dismiss; and Defendants' answer.

2. It was agreed by all parties that the Defendants' motion to dismiss should be continued and consolidated with other issues for a hearing by the three judges empaneled to hear this cause, and further proceedings on said motion are hereby ORDERED continued. It is further ORDERED that the first and second causes of action be, and the same are hereby, consolidated with the motion to dismiss for trial and that this cause is set for trial in the

United States District Court, Second Floor Courtroom, Federal Building, Montgomery, Alabama, on the 16th day of August, 1971, at 10:00 o'clock A.M., on the issues of fact and law presented by the complaint, the amended complaint, the motion for preliminary injunction, the motion and amended motion to dismiss, and the Defendants' answer.

3. It was agreed by all the parties that the case would be submitted on written stipulations or depositions on or before August 16, 1971, and it is the ORDER of this Court that all discovery be completed on or before August 10, 1971, and that the parties file with the Court briefs covering the law of the case on or before August 13, 1971.

4. It was agreed by all of the parties that the following are all of the issues in controversy in this cause: that Plaintiffs claim to be optometrists who will be harassed, irreparably damaged, and illegally and unconstitutionally deprived of their rights to pursue their profession if this Court does not enjoin Defendants, members of the State Board of Optometrists of the State of Alabama, from prosecuting proceedings in that body to revoke Plaintiffs' licenses and to deprive the Plaintiffs of their right to practice optometry in the State of Alabama. They claim that the procedure by which the Board is given authority to regulate their practice is violative of their rights under the Fifth, Sixth and Fourteenth Amendments of the Constitution for the following reasons:

A. The charges against Plaintiffs before the State Board are alleged to be too vague to sufficiently apprise the Plaintiffs of the charges against them.

B. The Board is charged with being prejudiced and biased against the Plaintiffs because of the Board members' prior activities in proceeding against the Plaintiffs and because of a pecuniary interest in excluding the Plaintiffs from practicing optometry.

C. It is charged that the law and rules of the Board improperly and unconstitutionally discriminate against the Plaintiffs as a state law provides that the Governor shall appoint, from the membership of the Association, the Board of Optometry which governs practice of optometry within the state and a by-law of the Optometrists' Association prohibits employed optometrists from membership in the Association. Plaintiffs contend they are thereby deprived of an opportunity to participate in the government of their own profession.

D. It is charged that the law providing for suspension of licenses of the Plaintiffs is unconstitutional as it provides for suspension by the Board with no provision for supersedeas on appeal to a court for review of suspension of the license.

5. Plaintiffs withdraw the charge in their complaint that the Board is estopped from prosecuting its suspension of license proceeding against Plaintiffs because it has annually renewed their licenses to practice, and the Plaintiffs withdraw, without prejudice, their claim for damages.

6. The Defendants, by motion, deny federal jurisdiction and, by answer, set up the following defenses:

A. They deny that charges against the Plaintiffs in the State Administrative proceedings are imprescise, and the parties agree that the charges against the Plaintiffs in the said state proceedings involve no charges of breach of ethics but are concerned only with the Plaintiffs' having violated laws.

B. Defendants deny that the hearing lacks due process of law.

C. Defendants insist, by virtue of Regulation 1, 1971, adopted by the Board, providing for supersedeas and recusal of Board members who have interests in

the proceedings, that due process will be accorded Plaintiffs on hearing in the Administrative proceedings.

D. They admit that a by-law of the Association prohibits optometrists who are employed by any company from being members of the Association, and they admit that the law provides that only members of the Association may be appointed to the Board. They further admit that the Board does control the practice of optometry in the State of Alabama.

It is, therefore, ORDERED by the Court that all of the above-named allowances and agreements be, and the same are hereby, binding upon all parties in the above-styled cause, unless this order be hereafter modified by order of this Court.

DONE this 30th day of July, 1971.

s/ R. E. Varner
United States District Judge

APPENDIX M

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA,
NORTHERN DIVISION

L. M. BERRYHILL, RICHARD T. WOOD, WILLIAM B. McCRORY, FRANKLIN H. PEARCE, B. J. FITZSIMMONS, WILLIAM BAYA, JR., JAMES J. COUCH, JAMES A. MILLER, HOWARD W. SMITH, J. HARRY SPARKS, O. L. WILSON, ROBERT M. HOWARD and JOHN H. PILLION,

PLAINTIFFS

VS.

CIVIL ACTION
NO. 3339-N

THOMAS S. GIBSON, E. E. ASHBEE, GEORGE R. CARLTON, MILTON E. WARR, and WILLARD SMITH, Individually and as members of the State Board of Optometry of the State of Alabama; STATE BOARD OF OPTOMETRY OF THE STATE OF ALABAMA, ALABAMA OPTOMETRIC ASSOCIATION, an unincorporated association, J. E. THOMPSON, President of Alabama Optometric Association, and ROY C. ADAMS,

DEFENDANTS

[Return Receipt shows filed on Sept. 22, 1971]

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Thomas S. Gibson, E. E. Ashbee, George R. Carlton, Milton E. Warr, and Willard Smith, Individually and as members of the State Board of Optometry of the State of Alabama; State Board of Optometry of the State of Alabama, Alabama Optometric

Association, an unincorporated association, J. E. Thompson, President of Alabama Optometric Association, and Roy C. Adams, the Defendants above named, hereby appeal to the Supreme Court of the United States from the final judgment entered in this action on September 3, 1971.

This appeal is taken pursuant to 28 U.S.C. § 1253.

s/ Richard A. Billups, Jr.
Richard A. Billups, Jr.
Attorney for Defendants
P. O. Box 1056
Jackson, Mississippi 39205

J. G. L. MARSTON, III
DONALD GEORGE VALESKA, II
Assistant Attorneys General
250 Administrative Building
64 North Union Street
Montgomery, Alabama 36104
OF COUNSEL

PROOF OF SERVICE

I, Richard A. Billups, Jr., one of the attorneys for Defendants herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 21st of September, 1971, I served copies of the foregoing Notice of Appeal to the Supreme Court of the United States on all parties required to be served, by depositing a copy of such Notice of Appeal in the United States Post Office, properly addressed, with first class postage prepaid, as follows:

1. On Honorable Harry Cole
Hill Building
Montgomery, Alabama

2. Honorable Douglas E. Bergman
Mercantile Bank Building
Dallas, Texas 75201

s/ Richard A. Billups, Jr.
Richard A. Billups, Jr.